**YAP MOI**

**v.**

**HONG LEONG BANK BHD**

COURT OF APPEAL, KUALA LUMPUR
MOKHTAR SIDIN JCA
ALAUDDIN MOHD SHERIFF JCA
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: J-02-768-1999]
20 NOVEMBER 2001

***BANKING:*** *Banks and banking business - Collection of 'Account payee only' cheques - Cheques banked in favour of third party - No authorisation by named payee - Respondent bank disregarding endorsement "account payee only", "not negotiable" and cancellation of "or bearer/atau pembawa" in cheques - Whether respondent bank acted recklessly - Peculiar contrary banking practice - Whether an accepted defence*

***NEGOTIABLE INSTRUMENTS:*** *Cheque - 'Account payee only' - Cheques banked in favour of third party - No authorisation by named payee - Whether respondent bank could seek protection under s. 85, Bills of Exchange Act 1949*

The appellant maintained a share account with JB Securities Sdn Bhd. In respect of some share trading payments, JB Securities Sdn Bhd issued eight cheques in favour of the appellant as the named payee. However, the appellant's remisier, one Ng Hong Chai ('Ng') came into possession of the said cheques and subsequently banked it in his favour in purported settlement of a debt due to him in his dealings. The respondent bank nevertheless converted the cheques in favour of Ng. The appellant consequently applied for summary judgment against the respondent bank, claiming the sum of money had and received by the respondent for the appellant's use or alternatively for conversion. The learned senior assistant registrar granted the order but the judicial commissioner set aside the said order. Hence, this appeal.

**Held:**
**Per Faiza Tamby Chik J**

**[1]** Ng helped himself to all the eight cheques by paying them into his account with the respondent bank. There was no evidence that the appellant either knew or authorised Ng to do so. Instead, the respondent bank collected the said eight cheques notwithstanding the fact that it had no mandate whatsoever. (p 567 a & b)

**[1a]** The respondent acted in contrary to all known and accepted norms by disregarding the endorsement "account payee only", "not negotiable" and the cancellation of "or bearer/atau pembawa" in the said cheques. The respondent bank had acted in reckless disregard of the clear mandate to the loss and detriment of the named payee and true owner. (p 567 c-d)

**[2]** The respondent's contention that they were authorised to clear and bank in the cheques by the appellant's son in law and that such practice of clearing third party account payee cheques was an accepted banking practice in Johor banking system and in 1993, was unfounded. Such banking practice could not be accepted and upheld by the court as it was contrary to law and the court could not legitimise unlawful practices, even if such practices existed. (pp 567 d, 571 d, i & 572 a)

**[3]** Further, the bank could not purport to seek protection under s. 85 of the Bills of Exchange Act 1949 ('the Act') as the mandate given in the eight cheques clearly and in no uncertain terms are to the appellant as named payee and no one else. Section 85 of the Act does not afford protection unless two conditions precedent are met, ie that it was done *bona fide* and it was done without negligence. The said preconditions were not satisfied. (pp 569 g-i & 572 d)

**[4]** The appellant had been deprived of monies due from JB Securities through the conversion of the eight cheques by the respondent bank. The cheques were not negotiable and crossed account payee. The true owner and named payee did not endorse the cheques to any third party. A collecting bank cannot collect it for a third party but the named payee. (p 576 f-g)

*[Appeal allowed.]*

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu mengendalikan sebuah akaun saham dengan JB Securities Sdn Bhd. Berhubung dengan beberapa pembayaran perdagangan saham, JB Securities Sdn Bhd telah mengeluarkan lapan cek atas nama perayu sebagai penerima bayaran. Walau bagaimanapun, remisier perayu, seorang bernama Ng Hong Chai ('Ng') mendapat milikan cek-cek tersebut dan kemudiannya memasukkan ke dalam bank atas namanya bagi tujuan penjelasan hutang yang masih belum jelas kepadanya dalam urusan-urusan beliau. Bank responden namun begitu menukar cek-cek tersebut atas nama Ng. Perayu kemudiannya memohon untuk penghakiman terus terhadap bank responden, menuntut jumlah wang yang dipunyai dan yang diterima oleh responden untuk kegunaan perayu atau secara alternatifnya untuk penukaran. Yang arif penolong kanan pendaftar telah memberikan perintah tetapi pesuruhjaya kehakiman mengenepikan perintah tersebut. Oleh itu, menyebabkan rayuan ini.

**Diputuskan:**
**Oleh Faiza Tamby Chik H**

**[1]** Ng mengambil kelapan-lapan cek tersebut dengan membayarnya ke dalam akaun beliau dengan bank responden. Tidak terdapat keterangan yang perayu sama ada mengetahui atau dibenarkan oleh Ng untuk melakukan sedemikian. Sebaliknya, bank responden telah mengambil kelapan-lapan cek tersebut meskipun pada hakikatnya bahawa ianya tidak mempunyai mandat apa sekali pun.

**[2]** Responden telah bertindak secara bertentangan dengan segala amalan yang diketahui dan yang diterima dengan tidak menghiraukan pengendorsan "account payee only", "not negotiable" dan pembatalan "or bearer/atau pembawa" pada cek-cek tersebut. Bank responden telah bertindak secara melulu tanpa menghiraukan mandat melunaskan yang merugikan dan memudaratkan penerima bayaran yang dinamakan dan pemunya sebenar.

**[3]** Penegasan responden bahawa mereka telah diberi kuasa untuk melunaskan dan memasukkan ke dalam bank cek-cek tersebut oleh menantu perayu dan bahawa amalan sedemikian bagi melunaskan cek-cek penerima bayaran akaun pihak ketiga adalah merupakan amalan perbankan yang diterima dalam sistem perbankan di Johor dan pada tahun 1993, adalah tidak berasas. Amalan perbankan yang sedemikian tidak boleh diterima dan dipertahankan oleh mahkamah kerana ianya bertentangan dengan undang-undang dan mahkamah tidak boleh menjadikan sah amalan-amalan yang tidak sah di sisi undang-undang, meskipun jika amalan-amalan yang sedemikian wujud.

**[3]** Selanjutnya, bank tersebut tidak boleh dikatakan cuba untuk mendapatkan perlindungan di bawah s. 85 Akta Bil-Bil Pertukaran 1949 ('Akta tersebut') kerana mandat yang diberikan dalam kelapan-lapan cek tersebut jelas dan di dalam terma-terma yang pasti adalah kepada perayu sebagai penerima bayaran yang dinamakan dan bukan sesiapa yang lain. Seksyen 85 Akta tersebut tidak memberikan perlindungan kecuali dua syarat duluan dipenuhi, iaitu bahawa ianya telah dilakukan *bona fide* dan ianya telah dilakukan tanpa sebarang kecuaian. Pra-syarat tersebut telah tidak dilaksanakan.

**[4]** Perayu telah terlucuthak akan wang yang kena dibayar oleh JB Securities Sdn Bhd melalui penukaran lapan cek oleh bank responden. Cek-cek tersebut tidak boleh diniagakan dan akaun penerima bayaran berpalang. Pemunya sebenar dan penerima bayaran yang dinamakan tidak mengendorskan cek-cek tersebut kepada mana-mana pihak ketiga. Sesebuah bank pengambil tidak boleh mengambilnya untuk pihak ketiga tetapi hanya untuk penerima bayaran yang dinamakan sahaja.

*[Rayuan dibenarkan.]*

**Case(s) referred to:**

*House Property Company of London (Ltd) & Ors v. The London, County and Westminster Bank (Ltd) [1915] 31 TLR 479* ***(refd)***

*Mahadevan & Anor v. Manilal & Sons (M) Sdn Bhd [1984] 1 CLJ 286; [1984] 1 CLJ (Rep) 230* ***(refd)***

*Nelson & Ors v. Larholt [1948] 1 KB 339* ***(refd)***

*Woodland Development Sdn Bhd v. Chartered Bank; PJTV & Densun (M) Sdn Bhd [1986] 1 MLJ 84* ***(refd)***

**Legislation referred to:**

Bills of Exchange Act 1949, ss. 81A, 85

**Other source(s) referred to:**

Poh Chu Chai, *Law of Banker and Customer,* 4th edn, pp 951-958, 1022, 1042

*For the appellant - M Pathmanathan (Shanti Pathmanathan); M/s M Pathmanathan & Co*

*For the respondent - Lim Kian Leong (Chan Kah Meng); M/s Lim Kian Leong & Co*

*[Appeal from High Court, Johor Bahru; Suit No: 22-584-1998(4)]*

*Reported by Raja Vishnu Sivarajah*

## JUDGMENT

**Faiza Tamby Chik J:**

The appellant applied for summary judgment against the respondent bank. The learned senior assistant registrar granted the order but the judicial commissioner set aside the order of the senior assistant registrar and granted the respondent conditional leave to appeal.

The facts of the case are plain and uncomplicated. The appellant maintains a share account with JB Securities Sdn. Bhd. (JB Securities) and the appellant is not a customer of the respondent bank (previously and at the material time known as MUI Bank). The appellant's remisier at JB Securities was one Ng Hong Chai who handled the appellant's account with JB Securities. Between 17 September 1992 and 15 December 1993 JB Securities issued the following cheques in favour of the appellant as the named payee in respect of the appellant's share trading account totalling RM1,632,300.92 (see pp. 175-182 of Appeal Record).

**Particulars**

| | Cheque No. | Dated | Amount |
|---|---|---|---|
| (i) | MBB 188115 | 17 September 1992 | RM 637,659.84 |
| (ii) | MBB 283201 | 30 October 1992 | RM 78,931.46 |
| (iii) | MBB 298834 | 17 November 1992 | RM 200,000 |
| (iv) | MBB 302809 | 25 November 1992 | RM 152,279.67 |
| (v) | MBB 316005 | 31 December 1992 | RM 76,149.59 |
| (vi) | MBB 123937 | 04 November 1993 | RM 190,533.50 |
| (vii) | MBB 126269 | 12 November 1993 | RM 197,106.30 |
| (viii) | MBB 493617 | 15 December 1993 | RM 99,640.60 |
| | | Total | RM1,632,300.92 |

Each of the eight cheques had the words "or bearer/atau pembawa" deleted and had the crossing:

(a) account payee only

AND

(b) not negotiable.

All the eight cheques had no other endorsements on their face or reverse. It is observed that Ng Hong Chai came into possession of the said eight cheques and without the appellant's knowledge or consent or authority banked in the said eight cheques through the respondent bank in his favour in purported settlement of a debt due to him in his dealings with one Kee Gek Hang and Teok Ah Kow @ Cheong Chan. Notwithstanding (a) the crossing "account payee only" and (b) "not negotiable" and (c) cancellation of "or order or bearer" and (d) the absence of any endorsement by the appellant on each and every one of the said eight cheques the respondent nevertheless accepted the deposit of the said eight cheques by Ng Hong Chai and collected payment on the said cheques totalling RM1,632,300.92 on the account of JB Securities with MBB. The appellant did not have knowledge or authorise, approve or consent to the said eight cheques being transferred and credited to Ng Hong Chai or any third party. Hence the appellant claims the sum of RM1,632,300.92 with interest and costs against the respondent for monies had and received by the respondent for her use or alternatively for conversion.

After a careful perusal of the documents filed in this appeal I find that Ng Hong Chai helped himself to all the eight cheques totalling RM1,632,300.92 by paying them into his account with the respondent bank. In para. 12 of his affidavit affirmed on 12 October 1998 (see p. 116 of Appeal Record) he stated that "all the eight cheques were paid in by me into my account with the defendant (then known as MUI Bank Berhad)". However, I can find no evidence that the appellant either knew or authorised Ng Hong Chai to do so. Instead the respondent bank collected the said eight cheques notwithstanding the fact that it had no mandate whatsoever. The cheque was a clear mandate by JB Securities to deduct their account with MBB (the paying bank) in settlement of their debt/dealing with the appellant, Yap Moi and not any third party. I am of the view that the respondent acted contrary to all known and accepted norms in blatantly disregarding the endorsement "account payee only", "not negotiable" and the cancellation of "or bearer/atau pembawa". In the circumstances the respondent bank acted in reckless disregard of the clear mandate to the loss and detriment of the named payee and true owner. The respondent's contention was that they were authorised to clear and bank in the cheques by the appellant's son in law, Kee and such practice of clearing third party account payee cheques was accepted banking practice in Johor banking system (p. 126 AR) in 1992 and 1993. The respondent further contended that a cheque endorsed as "not negotiable account payee only" is in fact transferable under the provisions of the Bills of Exchange Act 1949 before the amendment in 1998. The effect of such an endorsement is simply that the collecting bank has to pay the proceed into a bank account and that the transferee of the cheque cannot take a better title to it than the transferor.

In *Nelson and Others v. Larholt* [1948] 1 KB 339 at p. 342 Denning J said:

> A man's money is property which is protected by law. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is "the holder" (3) but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice – that is, if he knew of the want of authority or is to be taken to have known of it – he must repay. All the cases that occur in the books of trustees or agents who draw cheques on the trust account or the principal's account for their own private purpose, or of directors who apply their company's cheques for their own account, fall within this one principle. The rightful owner can recover the amount from anyone who takes the money with notice, subject, of course, to the limitation that he cannot recover twice over. This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with

an express trust, or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, nor on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires.

In *"Law of Banker and Customer"* 4th edn, a book written by Poh Chu Chai at p. 951, the writer stated:

The act of a customer in sending a stolen cheque for collection constitutes a conversion of the cheque as he is exercising a dominion over the cheque which is inconsistent with the rights of the person entitled to the immediate possession of the cheque. A banker who assists a customer to collect a stolen cheque is equally liable in conversion. Conversion is a tortious act which is committed by a person when he deals with chattels not belonging to him in a manner which is inconsistent with the rights of the lawful owner thereby depriving the lawful owner of their use and possession. The act of conversion does not depend on the intention of the party committing the act.

And at p. 951-952 the writer further stated:

In *Marfani & Co. Ltd. v. Midland Bank Ltd.*, Diplock LJ commenting on the liability of a collecting banker in conversion, said:

...

Subject to some exceptions which are irrelevant for the purposes of the present case, it matters not that the doer of the act of usurpation did not know, and could not by the exercise of any reasonable care have known, of his neighbour's interest in the goods. The duty is absolute; he acts at his peril. A banker's business, of its very nature, exposes him daily to this peril. His contract with his customer requires him to accept possession of cheques delivered to him by his customer, to present them for payment to the banks upon which the cheques are drawn, to receive payment of them, and to credit the amount thereof to own customer's account, either upon receipt of the cheques themselves from the customer or upon receipt of actual payment of the cheques from the banks upon which they are drawn. If the customer is not entitled to the cheque which he delivers to his banker for collection, the banker, however innocent and careful he might have been, would at common law be liable to the true owner of the cheque for the amount of which he receives payment, either as damages for conversion or under the cognate cause of action, based historically upon assumpsit, for money had and received.

Notwithstanding Ng' s lack of title the respondent nevertheless received those cheques as collecting bank and presented them to MBB (drawee) as paying bank for payment and received payment. The respondent as collecting bank is liable to the true owner of the cheques, in this case, the appellant (named payee), for conversion and money had and received.

Poh Chu Chai in his book *Law of Banker and Customer*, 4th edn at p. 956 stated:

> When a collecting banker receives the proceeds of a cheque for a customer who has no title to the cheque, the banker will be doing something which is inconsistent with the rights of the owner of the cheque and in so doing the banker will be committing an act of conversion against the owner of the cheque. In *Arnold v. Cheque Bank*, it was decided by Lord Coleridge CJ that a banker who collected a draft for a customer who had no title to the draft was liable to the owner of the draft for conversion and for money had and received.

And at p. 957-958, Poh Chu Chai further stated:

> It is thus clear that when a banker receives the proceeds of a cheque for a customer who has not title to the cheque, the receipt of the proceeds by the banker will constitute a conversion of the cheque. In *Kleinwort Sons & Co. v. Comptoir National D' Escompte de Paris*, it was contended that a banker who had collected a cheque for a customer could not be rendered liable in conversion unless the banker had placed the proceeds of the cheque into the customer's account and thereby appropriating the money to the use of the banker. If the banker had handed the proceeds of the cheque to the customer immediately after collection, the banker could not be rendered liable in conversion. In rejecting this contention, it was decided by Cave J that a collecting banker would have committed an act of conversion the moment he received the proceeds of a cheque from a paying banker and it did not matter whether he handed the proceeds over to the customer or retained them in the customers' account.

The respondent bank relies on s. 85 of the Bills of Exchange Act 1949. Section 85 does not afford protection unless the two conditions precedent are met, ie:

(a) it was done *bona fide*

AND

(b) it was done without negligence.

Clearly the respondent bank cannot even purport to seek protection under this section as the mandate given in the eight cheques clearly and in no uncertain terms are to the appellant as named payee and no one else. It is true that s. 81A was an amendment introduced on 1 July 1998 which bars transferring of account payee cheques. Prior to 1 July 1998 account payee cheques were transferable. However, the amendment does not assist the respondent bank as

there was no authority or mandate or endorsement by the true owner, the appellant to transfer the said eight cheques to Ng Hong Chai. At 1042 in his book *Law of Banker and Customer*, 4th edn, Poh Chu Chai stated:

> A banker who collected a cheque which had been crossed with the words "Account Payee" was under a duty to ensure that the proceeds of the cheque were duly paid into the account of the named payee of the cheque (In *House Property Co. of London Ltd. v. London, County and Westminster Bank* [1915] 84 LJKB 1846, it was decided by Rowlatt J that when a cheque was crossed with the words "Account Payee", the "Account Payee" crossing constituted a direction to a collecting banker that he should collect the proceeds of the cheque for the account of the person named as the payee on the cheque. Similarly, in *Woodland Development Sdn. Bhd. v. Chartered Bank* [1986] 1 MLJ 984, it was decided by Gunn Chit Tuan J that a collecting bank was negligent when it collected a cheque crossed with the words "Account Payee" for the account of a person other than that of the named payee on the cheque.) or that the named payee would receive the proceeds of the cheque after they had been collected. (In *Far Eastern Bank Ltd. v. Bee Hong Finance Co. Ltd.* [1971] 2 MLJ 6, it was decided by the Singapore Court of Appeal that a bank was entitled to collect an "Account Payee" cheque for the account of a person other than the named payee provided that the bank saw to it that the proceeds of the cheque were paid to the named payee.) Failure by a collecting banker to observe this duty of care would disentitle the banker from seeking statutory protection under section 5 of the Bills of Exchange Act.

In *House Property Company of London (Limited) and Others v. The London, County and Westminster Bank (Limited)* [1915] 31 TLR 479 the court held:

> Where a cheque is payable to payees named thereon "or to bearer" and is crossed "A/c Payee", and a bank collects it for a customer who is not one of the named payees and who has fraudulently paid it into his account, the bank is *prima facie* guilty of a conversion of the cheque and in the absence of further evidence is not protected by s. 82 of the Bills of Exchange Act 1882, but is liable for the amount of the cheque in an action brought against it by the drawers and the payees.

In *Woodland Development Sdn. Bhd. v. Chartered Bank; P.J.T.V. & Densun (M) Sdn. Bhd.* [1986] 1 MLJ 84 Gunn Chit Tuan J (as he then was) decided:

> Held: (1) the defendant bank was negligent in collecting cheques for the third party and were liable for conversion or alternatively for money had and received. The defendant bank was asked to return the said amount of $70,000 with interest to the plaintiff;

The Federal Court in *Mahadevan & Anor. v. Manilal & Sons (M) Sdn. Bhd.* [1984] 1 CLJ 286; ([1984] 1 CLJ (Rep) 230) at p. 287 (p. 233) stated:

> The statement is completely in accord with the legal position regarding such crossing on a cheque. "the A/c Payee only" crossing is only a direction by the drawer, in this case the respondent, to the collecting bank, ie, the Mercantile Bank into which the cheque was paid, that when it received the proceeds of the cheque from the paying bank, ie, GBN bank, it must place them in the account of the named payee, in this case, M/s. Ong Huck Lim & Co. If the collecting bank received the proceeds for any other customer than the one named in the cheque, it ran the risk of being sued for negligence and could not avail itself of the protection under section 85 of the Bills of Exchange Act 1949.

Poh Chu Chai stated in his book *Law of Banker and Customer*, 4th edn at p. 1022:

> Generally, a bank should be wary if it is requested by a customer to collect for the customer's own account a cheque made payable to a third party. It is the practice among some of our local banks to refuse to collect a cheque for a customer if the cheque is made payable to a third party.

Hence, the defence that the banks in Johor Bahru had a peculiar contrary practice is unfounded. No good faith – in fact Lee, a bank officer of respondent who accepted the cheques colluded with Ng and facilitated the conversion of the cheques. Nothing on the face of the cheques shows that good title to the cheques had in fact been transferred to Ng. The appellant was the named payee and did not endorse the cheques in favour of Ng or any other third party. Ng is not a named payee or endorsee of cheques. Cheques are not negotiable, account payee with bearer or order deleted. Such cheques should be paid into the account of the named payee only. If the collecting bank (respondent) accepted such cheques and paid into account of third party without express authority of the named payee, the collecting bank does so at its peril and cannot be said to have acted in good faith and without negligence. Some degree of care should have been exercised by the respondent in this case but was not done. Instead an officer of the respondent claims to have had personal knowledge of the unlawful arrangements and purported to give effect to such arrangements and participated in and facilitated the conversion of the cheques. The investigating officer confirmed the clandestine and unlawful arrangements and now is seeking the assistance of the court to legitimise the unlawful arrangements and transactions. I am of the view that not only did the respondent not act in good faith they were also *prima facie* negligent in accepting for collection by a third party customer an account payee, not negotiable with bearer or order deleted cheques without any endorsement by the named payee. Bare allegation that such banking practice was peculiar to Johor Bahru cannot be accepted and upheld by the court as it is contrary to law and the court cannot legitimise unlawful practices, even if

such practices existed. An unlawful transaction cannot be treated as lawful on the basis of a banking practice to that effect. (See *Law of Banker and Customer* by Poh Chu Chai).

The facts of the case show that even where endorsement appeared on crossed cheques the courts placed a high duty of enquiry on a collecting bank. The protection under s. 85 was accorded sparingly. The facts in the present case are alarming in that there was no endorsement and no bank acting reasonably ought to have collected the cheque except for the appellant. It was a case where an employee of the drawer (JB Securities) took his principal's cheque made in favour of a client. The respondent bank knew of the relationship between the appellant, JB Securities and Ng Hong Chai and ought to have sensed that something was amiss. Instead they actively assisted in the wrongdoing and in the process were guilty of conversion. The bank acted in reckless disregard of the mandate given in the eight cheques. The respondent bank cannot seek protection under s. 85 of the Bills of Exchange Act 1949 as the preconditions are clearly not satisfied. Clearly there is no triable issue here as affidavit evidence relied by the respondent clearly shows wrongdoing on the part of Ng and Lee, who are no longer in the employ of JB Securities and respondent respectively. It was the respondent's admission that they chose not to recognise the appellant as the named payee and true owner of the cheques and dealt instead with the third party customer who was neither a named payee nor endorsee of the cheques. That being so no protection whatsoever is afforded to the respondent under s. 85.

The respondent contended that the transaction in this appeal indicates a possibility of a double payment because Ng Hong Chai contended that he has repaid the claimed sum in respect of the said transaction. I am of the opinion that the respondent bank's defence that Ng Hong Chai has repaid the sum is not true. It is a bare statement and is unsupported by any evidence. The appellant was never repaid by Ng Hong Chai and the bare allegation is false and misleading. Ng Hong Chai says that he repaid Kee Gek Hang (and not the appellant) through cheques drawn on the respondent bank. In para. 19 in his affidavit affirmed on 12 October 1998 (p. 117 of Appeal Record) Ng Hong Chai stated:

> 19. The list of cheques by me to repay Kee amounting to RM2,060,493.17 is attached as Exhibit "NHC-3". I cannot obtain all the cheques issued as not all are available from the bank.

Exhibit "NHC3" are all cheques drawn on the respondent bank. They are in the custody and possession of the respondent bank and yet the respondent bank is refusing to produce and exhibit them to the court. This in itself made the repayment by Ng Hong Chai to the appellant or Kee Gek Hang suspicious. The sum owing to the appellant is only RM1,632,300.92. Why was there a need to repay RM2,060,463.17. Exhibit "NHC3" is reproduced below.

**Particulars**

| MUI Bank Cheque No. | Dated | Amount | |
|---|---|---|---|
| 313806 | 1 July 1992 | RM | 72,522.52 |
| 331876 | 2 November 1992 | RM | 20,000 |
| 331877 | 2 November 1992 | RM | 20,000 |
| 331878 | 2 November 1992 | RM | 20,000 |
| 321709 | 16 November 1992 | RM | 20,000 |
| 321710 | 16 November 1992 | RM | 20,000 |
| 321711 | 16 November 1992 | RM | 20,000 |
| 371712 | 16 November 1992 | RM | 26,604 |
| 331883 | 17 November 1991 | RM | 113,400 |
| 335379 | 8 December 1992 | RM | 11,220 |
| 331889 | 24 December 1992 | RM | 20,494 |
| 338131 | 29 December 1992 | RM | 80,000 |
| 338132 | 31 December 1992 | RM | 30,000 |
| 338133 | 31 December 1992 | RM | 30,000 |
| 338134 | 2 January 1993 | RM | 30,000 |
| 338135 | 2 January 1993 | RM | 30,000 |
| 338147 | 7 January 1993 | RM | 50,000 |
| 342074 | 4 March 1993 | RM | 20,952 |
| 345923 | 15 March 1993 | RM | 15,000 |
| 354833 | 10 May 1993 | RM | 50,000 |
| 356153 | 17 May 1993 | RM | 37,448.60 |
| 354850 | 26 May 1993 | RM | 28,440 |
| 372100 | 7 September 1993 | RM | 23,200 |
| 372093 | 9 September 1993 | RM | 41,050 |
| 359261 | 23 September 1993 | RM | 25,226 |
| 382877 | 1 November 1993 | RM | 12,223 |
| 385531 | 26 November 1993 | RM | 419,196.50 |
| 385548 | 3 December 1993 | RM | 25,200 |
| 387770 | 23 December 1993 | RM | 42,308 |
| 342066 | 23 December 1993 | RM | 21,252.25 |
| 389960 | 31 December 1993 | RM | 13,430 |

| | | | |
|---|---|---|---|
| 395277 | 2 March 1994 | RM | 6,509.30 |
| 395278 | 2 March 1994 | RM | 2,888.50 |
| 395293 | 11 April 1994 | RM | 1,871.43 |
| 395295 | 11 April 1994 | RM | 5,000 |
| Total amount paid from cheques | | RM1,405,276.10 | |
| Add: Amount deducted from Ng Hong Chai's commission and deposit with JB Securities | | RM | 655,187.07 |
| Total amount paid | | RM2,060.463.17 | |

The particulars of the eight cheques are reproduced below:

**Particulars**

| | Cheque No. | Dated | Amount |
|---|---|---|---|
| (i) | MBB 188115 | 17 September 1992 | RM 637,659.84 |
| (ii) | MBB 293201 | 30 October 1992 | RM 78,931.46 |
| (iii) | MBB 298834 | 17 November 1992 | RM 200,000 |
| (iv) | MBB 302809 | 25 November 1992 | RM 152,279.67 |
| (v) | MBB 316005 | 31 December 1992 | RM 76,149.59 |
| (vi) | MBB 123937 | 4 November 1993 | RM 190,533.50 |
| (vii) | MBB 126269 | 12 November 1993 | RM 197,106.30 |
| (viii) | MBB 493617 | 15 December 1993 | RM 99,640.60 |
| | | Total | RM1,632,300.92 |

A comparison of the dates and figures shows that the defence is not *bona fide.*

I think the respondent would have this court believe that Ng Hong Chai started repaying (on 1 July 1992) even before the 1st cheque (17 September 1992) was converted. The respondent would have this court believe that the respondent bank was making restitution whilst concurrently converting and collecting more of the appellant's cheques in favour of Ng Hong Chai. One startling example is that on 17 November 1992 the respondent bank collected RM200,000 (the 3rd cheque) and on the same day Ng Hong Chai repaid RM113,400 to Kee Gek Hong. Again on 31 December 1992 the respondent bank converted RM76,149.59 (the 5th cheque) by collecting the same in favour

of Ng Hong Chai but on the same day Ng Hong Chai repaid *vide* two cheques of RM30,000 each. I am of the view that this defence that the appellant has been repaid through Kee Gek Hong is incredible. The non-production of the cheques which are with the respondent bank clearly evidences the lack of *bona fide* in the defence.

The respondent contended that the appellant never specifically denied that her son-in-law Kee Gek Hong was using her name for trading. It is contended that the appellant being 70 years of age authorised her son-in-law, Kee Gek Hong to deal with her account and he (Kee) gave the 1st cheque for RM637,659.84 to one Teok Ah Kow who in turn handed it back to Ng Hong Chai in settlement of a debt due and owing by Teok to Ng Hong Chai. (see paras. 3-9, p. 114-115 of Ng Hong Chai's affidavit affirmed on 12 October 1998). In respect of the other seven cheques the defence is that these cheques were given to Ng by Kee. In para. 11 of his affidavit dated 12 October 1998 (p. 116 of Appeal Record) Ng Hong Chai stated:

> 11. In respect of the other cheques, these were given to me from time to time by Kee to reimburse me for money paid by me on his behalf.

In the next breadth at para. 14 he affirms:

> 14. Sometime later, for reasons I do not know, Kee made a claim against me for the amount paid into my account. He threatened to lodge a police report for criminal breach of trust against me. I also stopped being a remisier subsequently.

If the above clandestine arrangements were true then there is no need for Ng to repay. It must be remembered that the written contract is between the appellant and JB Securities and no other. JB Securities recognised the appellant and no one else. JB Securities issued its cheques and made payments to the appellant, their client. The respondent bank wrongly converted the eight cheques in favour of a third party. The respondent cannot adduce oral evidence to vary or contradict the written contract. JB Securities did not have a written contract with Kee and did not recognise Ng Hong Chai's clandestine arrangements. (At para. 15 of his affidavit at pp. 116 and 117 of Appeal Record Ng Hong Chai affirms: "I was also under duress and pressure from JB Securities Sdn. Bhd. to resolve the dispute. I therefore decided to avoid any trouble and pay the money back to Kee through the plaintiff's account"). Kee had no title to the cheques to pass on to Teok or Ng Hong Chai. On his own admission Ng did not deal with or obtain the appellant's authority or consent or endorsement to transfer or negotiate the eight cheques. The court is concerned only with the immediate parties to the cheque, ie, the true owner and named payee who has been deprived of the sum of RM1,632,300.92 that JB Securities paid *vide* the eight cheques in question.

It is observed that one Lee Wah Cheong, an ex-employee of the respondent bank, and a friend of Ng Hong Chai, confirms under oath that he assisted in the conversion. He states, *inter alia*:

(a) Although there was no endorsement on the eight cheques or any other mandate he purports that he knew Kee, Ng and Teok were all friends. He knew that Kee operated the appellant's share account and "it was quite natural for Ng to instruct me to pay the plaintiff's cheques into Ng's account." (See para. 4 of Ng Hong Chai's affidavit dated 12 October 1998, p. 125 of Appeal Record);

(b) "I had always understood from Ng and outside sources that this account was really operated by Kee as his own, and the plaintiff was only a nominee." (See para. 4 p. 125 of Appeal Record);

(c) "I believed from my knowledge of Kee and Ng that the plaintiff's cheques could be paid into Ng's account as part of their normal business dealings." (See para. 5 p. 125 of Appeal Record);

(d) "... the plaintiff did not personally have a beneficial interest in the money." (See para. 7 p. 126 of Appeal Record);

(e) "in Johore it is quite a common practice for account payee cheques to be paid into third party account as part of normal business transactions so long as all parties are aware of this procedure." (See para. 8 p. 126 of Appeal Record).

I think the above are startling sweeping statements and are baseless. The fundamental and primary issue is that the appellant has been deprived of monies due to the appellant from JB Securities through the conversion of the eight cheques by the respondent bank. The cheques are not negotiable and crossed account payee. The true owner and named payee did not endorse the cheques to any third party. A collecting bank cannot collect it for a third party but the named payee.

For these reasons the appeal is allowed with costs here and below. Deposit paid is to account for taxed costs. The judgment sum is to be paid and deposited to the High Court Johor Bahru.

My learned brothers, Mokhtar Sidin JCA and Alauddin Mohd. Sheriff JCA have read this judgment in draft and have expressed their agreement with it.